IN THE

United States Court of Appeals

For the Ninth Circuit

No. 21235

CLAIROL INCORPORATED,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

LANDELS, RIPLEY, GREGORY & DIAMOND,
235 Montgomery Street,
San Francisco, California 94104.

WEIL AND LEE,
60 East 42nd Street,
New York, New York 10017.

Attorneys for Petitioner,
Clairol Incorporated.

GILBERT H. WEIL,
PHILIP E. DIAMOND,
of counsel.

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I

The Beauty Salon/Distribution versus Consumption Issue.

Government counsel's brief (R.B.) relies heavily upon an argument that inasmuch as salons, when they color their patrons' hair, process and handle Clairol's products within the meaning of section 2(d), they must also distribute such products under that section's terms. (R.B. 16, 18-20.)

The Commission did not base its decision upon any such proposition,[1]—probably for the good reason that it is a patent *non sequitur*. A customer can, of course, handle or process commodities without distributing them.[2] Conversely, he may distribute without either processing or handling.[3] There is no cause-and-effect relationship be-

[1] Note that the Commission's decision must be valid upon its own footing, and is not to be saved by new rationalizations of its appellate counsel [Petitioner's Brief (P.B.) p. 19].

[2] E.g., a gasoline distributor handles not only the gasoline which he resells but also that which he uses in his trucks for making deliveries. But he distributes only the former.

[3] E.g., a wholesaler who has a commodity drop-shipped directly from his supplier to a retailer.

tween such distinct activities that makes the existence of one proof of the other.

Clairol's point was that the particular nature and result of the salons' handling and processing of its products are such as to terminate their existence in the hands of the salons, as materials used by them to perform their services (P.B. 3, 9-10, 17-18). Thus, beauty salons, in their utilization [4] of Clairol's products, fall outside the normal and customary concept of customers who purchase and 1) resell (P.B. 13-17, 21-26), 2) a supplier's commodity (P.B. 8, at n. 8). Both are vital ingredients of a section 2(d) violation. The Commission's brief does not demonstrate that they are not the true substantive requirements. Neither does it establish that they are factually supplied by the record in this case.

Clairol's brief pointed out that section 2(d) requires resale of the supplier's commodity (P.B. 13-14), and that the Commission evidently accepted that standard (P.B. 14), pivoting its decision upon a conclusion that resale of Clairol's products by the salons exists here (P.B. 19-21).

Commission counsel, however, take a more ambivalent stand. In footnote 22 (p. 29) in their brief, they offer definitions of "distribute" and "distribution" which are not coterminous with that of a sale. They then conclude: "Certainly the salons' transactions fit the stated Congressional purpose and those definitions, whether or not they also constitute sales of Clairol products."

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[4] The Commission decided this count upon the following identified and refined issue: "Are beauty salons, when in the course of rendering hair coloring services to their customers they utilize respondent's products, engaged 'in the distribution of' such articles within the meaning of section 2(d) of the Robinson-Patman Act?" (Tr. 89; P.B. 12.)

There are only three possibilities. Either "distribution" in section 2(d) is intended to have a meaning different from "resale" in section 2(e); or, if the words are to have a common meaning,[5] it must be either that of "distribution" for both sections, or of "resale" for both sections. The authorities cited at pages 13-14 of Clairol's brief speak for the last of these three constructions. The Commission's brief is not persuasive as to why they should be repudiated; and the Commission did not do so (C.O. 13, n. 12, Tr. 101; P.B. 13, 20).[6]

The Commission's major reliance for holding that salons resell rather than consume Clairol products is upon *Corn Products* (R.B. 21-24). However, in *Corn Products* the commodity involved (dextrose) was literally resold in unaltered chemical form, albeit as part of the total mix of a candy bar (P.B. 20, 26-27). A beauty salon, however, if it can be deemed at all to be selling a product to its patrons when it colors their hair, certainly does not resell to them "such products or commodities" as the salon has purchased from Clairol (Tr. 28-29).

This, as has been pointed out above (p. 2), is a factual difference of substantive significance. In order to avoid its impact and maintain a posture that "[t]he contention rejected in [*Corn Products*] was in all factual and legal essentials the same as Clairol's here . . ." (R.B. 21), the Commission's brief urges, "Nothing in the Supreme Court's

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[5] The Commission's brief (pp. 20-21) agrees that the meaning should be the same, for it describes section 2(d) and 2(e) as "companion provisions" and concludes that "a decision under either section of an issue common to both is also decisive as to that issue under the other section".

[6] Moreover, the Commission propped its decision essentially upon analogizing the within case to *Corn Products* which dealt explicitly and solely with "resale" under section 2(e) (Tr. 101-105).

"Under the analogous facts here the Commission, too, must find a resale, as did the examiner." (Tr. 103.) (Note discussion of the examiner's finding of resale, at P.B. 21-22.)

statement of the facts or the law in *Corn Products* suggests either that it believed the dextrose was an unaltered ingredient of the candy or that lack of alteration was a factor in its decision'' (R.B. 23). However, the Supreme Court thought enough of the fact to point out that the advertising for the candy stated that it was ''rich in dextrose'' (P.B. n. 27, at p. 20). The reference of the Supreme Court to ''little or much alteration of the character of the commodity purchased and resold'' must, upon the facts of the case, be read in the context of a commodity which, although changed in its physical appearance, still retains its essential chemical identity and integrity.[7] For, if changed in those respects, how could *such* products or commodities be *resold?* (P.B. n. 8, at p. 8.)

Most importantly, however, the Commission's brief, like the Commission's opinion, fails to explain satisfactorily its rejection of the unanimous authorities that transactions involving primarily the rendition of personal services, and only secondarily the utilization of products, are not deemed to be transactions of sale within the ordinary and usual meaning of the term (P.B. 9-12, 17-18, 26-27). Yet that is the intendment to be ascribed to congress (P.B. 25-26). Directly pertinent are those precedents which hold that beauty salons, in particular, engage in performing services, not selling products (P.B. 17); and especially so are those which attribute that understanding to the congress itself (P.B. 18).

The effort of the Commission's brief to distinguish *General Shale* (pp. 24-25), namely, that it involved a sale *by* the putative service firm rather than *to* it, is quite beside the point. Clairol cites *General Shale* as authority for the usual and ordinary legal concept that utilization of commodities by one who essentially renders a service does not constitute a sale of such products; even when they are as identifiable and immutable as the bricks in a building;

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[7] See *Armour & Co.* v. *Wantock* quotation at pp. 15-16, *infra.*

and even when the price of the total service contract is scaled overtly to the type of brick used; and even under the Robinson-Patman Act itself (P.B. 11, 18, 27).[7a] *A fortiori,* under the same statute, the rendition of hair coloring services, which involves destruction (not, as in *Corn Products,* mere masking) of product identity, and where the products do not enter as a bargaining factor into the price negotiation, is not to be deemed within the congressional contemplation of a transaction of "resale". At least, not until it has been shown that congress intended to employ the word in a manner at odds with its normal meaning. The Commission's brief proves no such intent.

While it is true that the statement from *Mueller* upon which Clairol relies (P.B. 9-10) was a *dictum* (R.B. 26), the diminution of its precedential persuasiveness stops there. Its holding, upon which the Commission relies, that sale of products actually took place (R.B. 27), has little impact here, for it was based upon an unlitigated finding of fact that had been stipulated as part of a consent cease-and-desist order.[8] (262 F.2d, at p. 448.)[9]

[7a] Similarly, it has been held under the act that an arrangement in which a truck rental firm provided its lessees with gasoline as part of the lease agreement was not a sale of gasoline. *Sano Petroleum Corp.* v. *American Oil Co.,* 187 F. Supp. 345 (E.D.N.Y. 1960).

[8] "Par. 2. In the course and conduct of his business the Respondent for several years last past has been engaged in the sale and distribution of various cosmetic and other preparations for external use in the treatment of conditions of the hair and scalp, including sale of such preparations through use of them in connection with treatments administered in his various offices." 49 F.T.C. 586, at p. 594.

[9] In *Ratigan* (R.B. 28), the "service" involved was, as the court made clear, no more than a mode of delivery, i.e., injection of morphine, not in the course of medical treatment. All sales classically require delivery, and the performance of that mere function does not, simply because it is effected via a hypodermic needle, transform the essential character of the basic transaction into one for the performance of personal services.

The primary purpose of women patronizing a beauty salon, however, is not to have Clairol's products, as Clairol manufactures and sells them, simply transferred onto their hair (P.B. 3-7).

The characterization in the Commission's brief of the *Mueller dictum* as "a preliminary marking out of inapplicable extremes between which hair treatment lies" is, we submit, ill-founded. Hair treatment does not lie between the extremes described by the court. It involves more by way of personal service and less by way of product transference than even the lowest end of the court's scale of non-sale transactions (P.B. 4-6, 9-10). The court's observation is, therefore, applicable and persuasive.

Clairol's authorities establishing that "resale" does not, in its customary and natural sense, embrace the hair coloring activities of beauty salons (P.B. 17-18), are merely brushed aside by Commission counsel with the pronouncement, satisfactory to themselves, that Clairol's reliance upon them is mistaken as they are inapplicable to sections 2(d) and (e) of the Robinson-Patman Act (R.B. 28). This is, in essence, a circumlocutional claim that congress intended to use the word unnaturally in that statute. But counsel merely state the contention; they do not support it. Instead, they veer off into the foggy Wonderland in which, according to them, an administrative agency is supposedly empowered to vest a statute with whatever meaning is agreeable to the agency, provided only that it not be an unreasonable one (R.B. 29-30).

This is perilous domain. Usually, when a statute is ambiguous neither of its resolutions is wholly unreasonable. Yet, only one would be correct. It goes too far to claim that, as a general proposition of law, an agency, rather than the courts, determines the legally correct construction of the statute it administers.

The authorities cited by Commission counsel for their proposition do not go that far. It is hard to conceive how they could. To the extent that some of their generalized statements leave that impression, they must be read against their contexts, which are quite different from that at bar.

Those cases deal with statutes by which congress intended to vest in the administrative agency wide latitude to exercise its discretion, judgment, and policy in dealing with the regulated subject areas. Where that is so intended, congress uses terminology of a deliberately broad and imprecise scope. Exemplary of this is the following explanation in *Gray* v. *Powell,* 314 U.S. 402, at pages 411-412 (R.B. 30):

> "Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other."

In *Gray* the question dealt with the word "producer", defined in the Bituminous Coal Act of 1937 [15 U.S.C. §847(c)] as anyone "engaged in the business of mining coal." So broad a classification lacks an ordinary, natural and usual meaning, such as "resale" possesses. Significantly, the court stated:

> "The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed." (314 U.S., at p. 413.)

Thus, the court held, in effect, that where the status of a producer would be clear to the court (i.e. where the "separation of production and consumption is complete") the court's construction and application of the Act would unquestionably govern. Only where there is doubt as to who satisfies the statutory definition of a producer, *i.e.* who is "engaged in the business of mining coal", will the court leave a sensible exercise of judgment by the Commission undisturbed. In the case at bar, there can be little doubt that under controlling rules of law beauty salons do not sell Clairol products when they color hair (P.B. 17-18, 21-26), and hence the court's responsibility to rule that they do not compete in the "resale" thereof is not superseded by the Commission's exercise of discretion in its construction of that term.

Atlantic Refining (R.B. 29-30) involved the phrase "[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce", in section 5 of the Federal Trade Commission Act. The court characterized this as "a broad delegation of power [empowering] the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . .'." (381 U.S., at p. 367.) It was as part of the same paragraph that the court wrote the statement quoted at pages 29-30 of the Commission's brief.

U.S. v. *Drum* (R.B. 30) concerned application of definitions in the Interstate Commerce Act [49 U.S.C. §303(a)] of the terms "contract carrier" and "private carrier". In the words of the court, the case involved determining "the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. Private carriers are defined simply as transporters of property who are neither common nor contract

carriers; and the statute will yield up no better verbal guide to the reach of its licensing provisions than transportation 'for compensation' or 'for hire'." (386 U.S., at p. 376.)

In the case at bar, however, the word "resale" is not imprecise in its definitional function. Note, for example, the hearing examiner's initial decision, Findings 59 and 60 (Tr. 73-74), adopted by the Commission (Tr. 85):

> " 'Sale', or 'offering for sale', is defined in the Uniform Sales Act in Section 1(2) as '. . . an agreement whereby the seller transfers property and goods to the buyer for a consideration called the price.' Many similar authoritative definitions might be cited.
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> "From what we believe to be the 'normal and customary meaning' of the word 'sale', a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid."

N.L.R.B. v. *Hearst Publications* (R.B. 30) turned upon the word "employee" in the National Labor Relations Act, 29 U.S.C. § 152. Starting from a basic premise that the word had no reliable uniform meaning in common law,[10] the court reasoned that congress intended a consistent federal application of the term rather than one dictated by the several and varying laws of forty-eight states. Therefore, said the court, there being in effect no usual and ordinary meaning of the word, congress must have intended to use it in a special sense, and—not having specified what that was—must further have wished to leave it for development under the experiential expertise of the agency dealing with

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[10] 322 U.S. 121-122, esp.: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."

the particular matters which were the subject of the statutory concern.[11]

In the case at bar—as pointed out immediately above—the word sale (hence "resale") is well and clearly understood. There is no basis for finding that congress intended to use it innovatively.

P. Lorillard (R.B. 30) is hardly in point. The statutory phrase was "to pay or contract for the payment of anything of value to or for the benefit of a customer" in section (d) of the Robinson-Patman Act. Lorillard had made payments to third parties (radio broadcasting companies), part of which redounded to the benefit of Lorillard's retailer customers. The Commission found such payments to be "for the benefit of" such retailers notwithstanding that the classic legal elements of a third party beneficiary contract were not present as such. Obviously, nothing in the statute requires there to be a formal, third party beneficiary contract, or even a contract of any sort. The mere making of payments for the benefit of a customer is all that is needed to cast the violation. In the within case, however, engagement in "resale" (not "use" or "consumption") by the customer is a statutory prerequisite to offense.

Finally, in *Purolator* (R.B. 30) the issue was whether, under section 2(a) of the Robinson-Patman Act, Purolator had "discriminate[d] in price between different purchasers of commodities of like grade and quality". Some of such purchasers did not buy directly from Purolator, but it exercised substantial control over the prices they had to pay their immediate vendors. There would seem to be little need to rely upon a doctrine of broad agency power to

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[11] "The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board." 322 U.S., at p. 130.

mold a statute in order to uphold the Commission's ruling that Purolator had in fact discriminated in price between two different purchasers by exercising control over all the relevant prices and setting them at different levels. In the case at bar, on the other hand, almost autonomous authority in the Commission would be required to allow it to hold that there has been a "resale" where there is not a sale.[11a]

In sum, the within case contrasts with the above line of authorities in that it involves congressional use of a familiar word with a delimited ordinary meaning. The words "sale", and hence "resale", have long history and established usage. They are not rubbery, as are phrases such as "unfair or deceptive acts or practices" [12] or "in restraint of trade" [13] or "substantially to lessen competition or tend to create a monopoly".[14]

Moreover, in another section of the very same statute, where congress did wish to govern more than is conveyed by the usual meaning of "resale", it employed additional, different words to denote its larger objective (P.B. 15-17).

Clearly, then, the Commission has been given no license broadly to tamper with what the congress wished to do when it chose the word "resale"' to express its intent in section 2(e)—and hence for 2(d). Fuzzy generalities (e.g., that the underlying purposes of sections 2(d) and 2(e) to prevent evasion of section 2(a) would be frustrated if the provisions of 2(d) and 2(e) relating to resales could not also be applied to transactions that are not really resales [R.B. 25-26]) are of little moment where the congres-

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[11a] "I've often seen a cat without a grin, but a grin without a cat! It's the most curious thing I ever saw in all my life!" *Alice in Wonderland.*

[12] F.T.C.A. § 5(a), 15 U.S.C. § 45(a).

[13] Sherman Act § 1, 15 U.S.C. § 1.

[14] Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a).

sional intent has been clearly and specifically identified by its choice of so well-understood a word as "resale". All the more so, where that word's customary meaning accords thoroughly with the fundamental legislative intent to deal in the Robinson-Patman Act only with competition in the sale of commodities and products, not in the rendition of services (P.B. 15-17).

Clairol's brief analogized the distributional structures and consumption patterns of its products to those of a laundry bleach (P.B. 8, 10). The Commission's brief does not claim that the analogy is in any way false; and it does not argue that laundries do compete in the distribution (resale) of the bleaches they use upon their customers' wash. In fact, the Commission's brief treats the analogy with an utter silence which, we suppose, is intended to be disdainful.

Yet, we submit, the analogy makes the point. And it can be extended to illuminate the inapplicability of *Corn Products.* Assume that the manufacturer of a dry bleach preparation sells it to two types of customers, (1) laundries which mix it with their detergents and then use them in the performance of their usual services, and (2) sub-manufacturers who mix the dry bleach with detergent powders and sell the detergent-bleach mixture to their customers. It would seem clear that the sub-manufacturers compete with each other in the distribution of the original bleach, well within the concept of *Corn Products,* but that the laundries do not.

The bearing of the analogy upon this case is enhanced if it be further assumed that the result of the laundries' mixing of bleach and detergents is to chemically destroy the bleach.

II

The *Meyer* Form of Order Issue.

The difference between the forms of order proposed by Clairol (P.B. 28-29) and by the Commission (R.B. 32-33) is: the former extends the obligation of equal availability of Clairol's cooperative promotional programs to competing retailers and salons who purchase from wholesalers to whom Clairol has sold, while the Commission would have it embrace all competing retailers and salons, regardless of how many intermediate buyers and resellers may have intervened between them and Clairol.

Clairol's form of order adheres to the true holding of *F.T.C.* v. *Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968); the Commission's breaks new ground. The difference is far more than technically legalistic.

It is common, in the distribution of cosmetic items such as Clairol's, for the merchandise to pass through many, quite untraceable hands, before reaching the ultimate retailer. There are innumerable wholesalers and sub-wholesalers. Individuals will buy enough merchandise from such distributors to load a passenger car or station wagon, and peddle it to small retailers or salons. One retailer or salon may buy occasionally from another. Some "retailers" may be house-to-house peddlers; and beauticians may operate in their own homes, or in those of their customers.

It is simply impossible for Clairol, or any other sizable manufacturer, to fulfill an obligation to deal with every such "retailer" or "salon" under section 2(d). There is no way it can identify or keep track of them; and if there were, the cost of doing so would be prohibitive. Yet, presumably, Clairol would be in violation of the Commission's order:

> 1. If it failed to get actual notice through to every such retailer or salon of any promotional plan

or allowance it had available for any competing direct customer (Guide [15] 6(b) and 8; Pr. G.[16] 6(b) and 8).

2. If it failed to design the promotional program or allowance so that every one of that variegated multitude of retailers or salons could render the services or perform the acts necessary to qualify under it (Guide 9; Pr. G. 9).

3. If it failed to police every such retailer and salon to make sure that it actually performed the services and acts necessary to qualify for the benefits or allowances before making payment thereof, including cost accounting adequate to insure that such outlet received no payment in excess of what it actually used to perform the service (Guide 11; Pr. G. 11).

4. If it failed to get proper payment through to any such retailer or salon.

There can be only one solution to such impossible burdens: to discontinue all cooperative promotional programs. Obviously, neither the congress nor the Supreme Court intended that.

The facts actually before the Supreme Court in *Meyer,* and hence the delimitation of its holding, dealt only with retailers no further removed in the chain of distribution from the manufacturer than those who bought from the

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[15] F.T.C. Guides for Advertising Allowances and other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act. 16 CFR Part 2.40, 32 F.R. 15542 (Nov. 8, 1967), 1 CCH Trade Reg. Rep. ¶ 3980.

[16] F.T.C. Proposed Amended Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 F.R. 10616-10619 (July 25, 1968), 5 CCH Trade Reg. Rep. ¶ 50,209.

wholesalers to whom he sold. Clearly, such retailers would be far easier (although still not easy) to trace, identify, and maintain the requisite relationships with, than retailers at increasingly further levels of sub-distribution. Indeed, it seems to have been within the express contemplation of the Supreme Court that a manufacturer, working through his direct wholesalers, could feasibly reach to *their* immediate customers.[17]

> "The Commission argues here that the view we take of § 2(d) is impracticable because suppliers will not always find it feasible to bypass their wholesalers and grant promotional allowances directly *to their* numerous retail outlets.[!] *Our decision does not necessitate such bypassing* . . . Nothing we have said bars a supplier from utilizing *his wholesalers to distribute payments or administer a promotional program,* so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product." 390 U.S. 341, at p. 358 (emphasis ours).

There is no reason to assume that the Supreme Court's decision would have been the same in a different factual setting, *i.e.,* where the retailers involved are so far removed from, unknown and unknowable to, and unreachable by the supplier that he cannot assure the allowances will be available to every one of them, within the Commission's concepts of availability (*supra,* pp. 13-14).

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be sug-

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[17] "But rather than concluding, *as we have,* that retailers *who purchase through Hudson House and Wadhams* [direct buying wholesalers] . . . were disfavored customers of Tri-Valley and Idaho Canning [the manufacturers] . . ." 390 U.S. at p. 355 (emphasis ours).

> gested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-133 (1944).

Proof that cooperative promotional programs would be inoperable under the type of order now proposed by the Commission (*supra,* pp. 13-14) was not made during this proceeding, as it would have been immaterial to any issue then pending. At that time the Commission's concept (and order) in the *Meyer* case was that the supplier was obligated to extend its retailer cooperative promotional programs only to *direct* buying customers, *i.e.* to retailers and to wholesalers who sell to competing retailers. The Commission itself agreed, as the Supreme Court recognized in the passage quoted above, that "suppliers will not always find it feasible to bypass their wholesalers and grant promotional allowances directly to their numerous retail outlets." No record had to be made of that, therefore, during the administrative proceeding herein on April 30, 1965 (Tr. 48).[18]

Minimally, therefore, the Commission's form of order, imposing such novel and drastic impediments upon cooperative promotional programs, should not be sanctioned without an opportunity for Clairol to litigate the issues which such a proposed order raises. Clairol has had neither notice nor chance to do so thus far. To place it under so stringent an order without a day in court to present pertinent evidence against it would be a severe deprivation of due process.

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[18] The Supreme Court's conception of an extended obligation to the retailers themselves was not articulated until March 18, 1968.

Conclusion

The Commission's cease and desist order should be modified by striking therefrom clauses 2(a) and 2(b), and by revising clauses 1(a) and 1(b) to conform with the Supreme Court's decision in *Meyer,* to wit:

1. Clause 1(a) should be amended to make clear that the "retailer customer" and "retailer customers" referred to therein are retailers who purchase directly from Clairol.

2. Clause 1(b) should be changed to read:

> "Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other retailers who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use."

Respectfully submitted,

LANDELS, RIPLEY, GREGORY & DIAMOND,
235 Montgomery Street,
San Francisco, California 94104.

WEIL AND LEE,
60 East 42nd Street,
New York, New York 10017.
Attorneys for Petitioner,
Clairol Incorporated.

GILBERT H. WEIL,
PHILIP E. DIAMOND,
of counsel.